IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 289

PHILIP J. MASON, Executor of the Estate of C. HERMANN SCHEELE, deceased, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, the appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 22, 1958. (Appendix to this petition, p. 7a).

The Court of Appeals reversed an order of the District Court, dated July 9, 1957 (J. A. (Joint Appendix) 34), adjudging that plaintiff as the duly appointed executor of the Estate of C. Hermann Scherf is entitled to make claim for and to receive payment of the debt to the same extent as would have the decedent, C. Hermann Scherf, and that said

C. Hermann Scherf, if living, would have been entitled to make said claim and receive such payment, and ordering payment of the debt from funds in the possession of defendant as a result of Vesting Order No. 17256, dated January 25, 1951.

OPINIONS BELOW

The District Court wrote a short unreported memorandum opinion which is set forth on pp. 33 and 34 of the Certified Record (J.A. 33-34). The opinion of the Court of Appeals has not been reported and is set forth on pp. 41-46 of the Certified Record (App. pp. 1a-6a).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 22, 1958 (R. 47, App. 7a). The jurisdiction of this Court is invoked under Title 28 U.S. Code, Section 1254(1). The District Court had jurisdiction under Section 34 of the Trading with the Enemy Act, Title 50, App., U.S. Code, Section 34.

QUESTIONS PRESENTED

1. Where, following an officially announced change of policy of the United States Government, certain confiscatory powers of the Trading with the Enemy Act have been terminated by administrative action and confirmed in the Joint Resolution of Congress terminating the war with Germany (c. 519, 65 Stat. 451); may a Court of Appeals restore such powers by judicial interpretation?

2. Where the language of Section 34 of the Trading with the Enemy Act and its legislative history clearly show that it was the intention of Congress that a debt

owing to a deceased American creditor be paid in full to his executor (legal representative), if qualified, and that any enemy interests in the estate should be reached through the vesting process, and where the vesting powers have been eliminated by executive and congressional action, may a court in effect restore such vesting powers through the adding of qualifications which the statute does not contain and which, at the time of the enactment, had been deliberately omitted from the act?

3. May a Court of Appeals reverse a judgment of the District Court where such judgment was rendered in strict compliance with the language of the statute (Section 34 of the Trading with the Enemy Act) and in compliance with decisions of this Court that, as a confiscatory statute, the Trading with the Enemy Act must be strictly construed? *Guessefeld* v. *McGrath*, 342 U.S. 308, 319; *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent provisions are printed in the Appendix, infra, pp. 7a et seq.

STATEMENT OF THE CASE

Nature of the Action

This action was instituted by petitioner in the U.S. District Court for the District of Columbia pursuant to Section 34(c) of the Trading with the Enemy Act (60 Stat. 925, 50 U.S.C. App. Sec. 34 (c)), as amended, to review partial disallowance of petitioner's claim for payment of a debt out of property vested by the Alien Property Custodian by Vesting Order No. 17256 (J.A. 19).

Origin of the Debt-Claim

The debt was owed to C. Hermann Scherf by his brother, Alexander Scherf, who was the owner of said property immediately prior to its seizure.

The property consisted of a life insurance policy which was issued by the Mutual Life Insurance Company of New York in 1927 to Alexander Scherf, who was then a resident of Germany. He paid the premiums until 1938, when the German foreign exchange laws made it impossible for him to send funds out of Germany. Upon his request, C. Hermann Scherf, an American citizen residing in New York, agreed to and did advance the money to pay such premiums as long as world conditions should make that necessary. Hermann paid the premiums, beginning with the premium due in 1938, which was paid on January 1, 1939, until his death in December, 1950. The 1951 premium was paid by the executor of C. Hermann Scherf. In consideration of the premiums paid by Hermann in Alexander's interest, Alexander promised to make Hermann the primary beneficiary under the policy. As soon as circumstances permitted, Alexander signed on August 9, 1948, a request for change of beneficiary. The Insurance Company advised Hermann that he needed the consent of the Office of Alien Property. By letter of December 14, 1949, Hermann made his position as owner of a debt-claim against his brother known to the Office of Alien Property and applied for a license to effectuate the attempted change of beneficiary. By letter of January 31, 1950, the Office of Alien Property refused to grant the requested license.

Hermann Scherf died in December, 1950. He left a will dated July 29, 1949. The will named Philip J. Maron, an American citizen residing in New York,

as executor. By the provisions of the will (J.A. 23-24), the testator created a trust to be used predominantly for the eduction and maintenance of the testator's nephew Norman while attending college, and for a monthly allowance to the testator's niece Pia, "so long as she may be a resident of Canada or the United States." The trust was to end five years after the termination of Norman's studies at college. The principal was to go to Alexander Scherf, "if he then be a resident of Canada or the United States," otherwise to Norman. In case of Norman's death during the life of the trust, the trust should terminate and the principal should be paid to Alexander if he then be a resident of Canada or the United States, otherwise to Edward Gerhardy, a citizen of the United States residing in Milwaukee, Wisconsin.

The provisions of the will clearly reflect Hermann's intent that none of his money was to go to Germany or any other former enemy country, and that his relatives were to benefit only in case they were residents of the United States or Canada, otherwise the estate was to go to the testator's long time American friend, Edward Gerhardy. Since about 1947, Norman and Pia Scherf have resided either in the United States or Canada. Alexander Scherf died on February 20, 1954, as a resident of Montreal, Canada.

When Hermann wrote his will, he had a right to assume that his bequests to his relatives would be safe notwithstanding the fact that they may have come within the definition of "enemy" under the Trading with the Enemy Act, because by that time it had been officially announced that the U.S. Government would no longer confiscate German property and rights

acquired in the United States after January 1, 1947.[1] The rights of the beneficiaries under Hermann's will did not come into existence until December, 1950. Hence, no enemy interests are involved in connection with Hermann's estate, and none have been vested.

Vesting of Alexander's Property

However, on January 25, 1951, the Attorney General vested the proceeds and the rights under the insurance policy by Vesting Order No. 17256. The policy was converted into cash, and there are now in the hands of the Office of Alien Property approximately $16,000.

The Administrative Proceedings

On August 9, 1951, plaintiff, having been duly appointed executor of the Estate of C. Hermann Scherf, filed with the Office of Alien Property a Notice of Claim, seeking payment of the debt in the sum of $15,617.33, representing $11,246.20 advanced and paid by C. Hermann Scherf for premiums pursuant to his agreement with Alexander, and $4,371.13 interest on said advancement from January 13, 1939, to January 15, 1951 (J.A. 7). Hermann Scherf was, and petitioner has been, a citizen and resident of the United States at all material times.

The Office of Alien Property took the position that the right of the executor to receive payment depended on the right of the ultimate beneficiaries to claim as individuals, and the claim was denied "to the extent that it is for the benefit of Pia and Norman Scherf" (J.A. 18 and 29).

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[1] See Press Release of the U.S. Treasury Department, dated March 4, 1947 (App. 10a), and *GMO: Nichaus & Co. v. United States* (Ct. Cl. 1957), 153 Fed. Supp. 428.

Action in the District Court

Petitioner filed a complaint in the United States District Court for the District of Columbia pursuant to Section 34(c) of the Trading with the Enemy Act, praying that respondent pay to petitioner the full amount of the debt. (J.A. 30). Both parties moved for summary judgment. The District Court granted plaintiff's (petitioner's) motion for summary judgment, denied the defendant's (respondent's) motion for summary judgment and held in a memorandum opinion (J.A. 33-34):

> "Section 34 of the Trading With the Enemy Act provides that 'legal representatives * * * other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.'
>
> "It is the opinion of the Court that the plaintiff as the duly appointed executor of the Estate of C. Hermann Scherf is entitled to make claim for and to receive payment of the debt to the same extent as would have the decedent, C. Hermann Scherf, and that said C. Hermann Scherf, if living, would have been entitled to make said claim and to receive such payment."

Finding expressly that there was no genuine issue as to any material fact in this case and that Alexander Scherf was indebted to the Estate of C. Hermann Scherf in the amount of $15,617.33, the District Court ordered payment of the entire debt to plaintiff (petitioner).

Respondent appealed from that order. The Court of Appeals reversed the judgment of the District Court. It held that the policy of Section 9(a) of the Trading with the Enemy Act governing the *return* of vested property is applicable to Section 34, viz. the extent of an executor's recovery should be measured in terms of those who will ultimately benefit. The court held, in other words, that the right of the executor to recover depended on the right of the ultimate beneficiaries to claim, and since Norman and Pia under the statute are ineligible as claimants, the executor cannot claim what may eventually enure to their benefit.

Two judges, viz. Judge Danaher and Judge Burger, while concurring in the result, deemed the result "grossly and inherently unfair." They wrote a separate opinion (R. 44-46; App. 4a-6a) in which they pointed out that the unfair result quite obviously was brought about by Hermann's misplaced reliance upon an officially announced Government policy to refrain from vesting property acquired in the United States by nationals of Germany subsequent to December 31, 1946. Had he not placed such reliance on the United States Government, the judges said, then Hermann readily, by will, or otherwise, could have made valid arrangements as to his own property, "even to the point of carrying out his plans for these very beneficiaries." And the opinion concludes:

> "Since Hermann's misplaced reliance upon an officially announced Government position resulted in making beneficiaries of Norman and Pia who are ineligible "debt claimants," Hermann's interest or that of his estate becomes forfeited, not-

withstanding his loans of thousands of dollars to keep the life insurance policy in force.

"That seems to be the law but it does not seem right."

REASONS FOR ALLOWANCE OF THE WRIT

We are confronted here with a situation where part of the confiscatory features of the Trading with the Enemy Act had been terminated so that property brought into this country or acquired in this country by an "enemy" after the Presidential Proclamation of December 31, 1946, declaring hostilities at an end, may not be vested.[2]

Section 34, under the authority of which this action was brought, entitled American creditors who had extended credit in reliance upon American assets of their debtors which later were seized by the Alien Property Custodian to seek payment of such debts out of their debtors' confiscated property. The statute extended the same right to their "legal representatives" which includes executors of their estates. The statute contains no provisions making the right of an executor to receive payment dependent on the right of the ultimate beneficiaries to claim. The legislative history reveals that the omission of such qualifications was intended by the Alien Property Custodian who drafted the provisions. The intent was that the legal representative of a fund or estate should collect the entire debt due to the fund or estate and that any enemy interests therein would be vested by the Alien Property Custodian who would then claim the interests which such enemies had in the debt. The interests

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[2] See Joint Resolution of October 19, 1951, c. 519, 65 Stat. 451; *GMO Nichaus & Co.* v. *United States* (C. Cl. 1957), 153 F. Supp. 428, 430.

in the estate of C. Hermann Scherf were acquired by Norman and Pia at a time when the vesting powers of the Alien Property Custodian no longer existed. Consequently, no interests in the estate could be vested, and none have been vested.

By ordering payment of the debt to the executor, the District Court gave effect to Section 34 as it was written and as it was intended. The Court of Appeals, on the other hand, by adding qualifications to Section 34 which it does not contain and which had been deliberately omitted, restored in practical effect the confiscatory features for which there was no longer any statutory authority. Thereby the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

The Court of Appeals expressly deplored the "grossly and inherently unfair" results of its decision. There would have been no need for such regrets, if only the Court of Appeals had followed certain important principles laid down by this Court in its construction of confiscatory war legislation, viz.

(1) the Trading with the Enemy Act is strictly a war measure, *Stoehr* v. *Wallace*, 225 U.S. 239; 65 L.Ed. 604, which, as it gives the government power to confiscate privately owned property without compensation, would in time of peace be clearly prohibited by the Fifth Amendment of the U.S. Constitution, *Stoehr* v. *Wallace*, supra; *Becker Steel Company of America* v. *Cummings*, 296 U.S. 74; 80 L.Ed. 54; *Miller* v. *United States*, 78 U.S. (11 Wall.) 268; 20 L.Ed. 135.

(2) Confiscation may not be easily assumed, therefore a construction which avoids it, is invited. *Guessefeld* v. *McGrath*, 342 U.S. 308; 96 L. Ed.

342; *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 92 L.Ed. 88; *Markham* v. *Cabell*, 326 U.S. 404; 90 L.Ed. 165.

(3) Even in time of war, there must be a statutory authorization of confiscation of the property of enemies. *Brown* v. *United States*, 12 U.S. (8 Cranch.) 110, 123; 3 L.Ed. 504, 509; *Miller* v. *United States*, supra; *Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475; 92 L.Ed. 81.

It is respectfully submitted that the Writ should be allowed (a) because the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court;

(b) because this case involves an important question of federal law never decided by this Court, namely the question whether, when part of the confiscatory features of the Trading with the Enemy Act have come to an end because authority to vest has been withdrawn, such confiscatory features may be restored by judicial interpretation, enabling the Custodian to confiscate indirectly what he can no longer do directly;

(c) because indirect confiscation of property which is not enemy property violates the provisions of the Fifth Amendment of the U.S. Constitution. (App. 7a)

ARGUMENT

Section 34 Was Enacted to Replace Debt Claim Provisions of Section 9

After the outbreak of World War II, the first action for payment of a debt owed by a person whose property had been seized under the authority of the Trading with the Enemy Act was brought under Section 9(a) of said Act which contains a provision for

payment of debt claims. *Markham* v. *Cabell*, 326 U.S. 404; 90 L.Ed. 165. The Alien Property Custodian, who has always given the Trading with the Enemy Act the widest possible construction in favor of confiscation, bitterly opposed that action claiming that Section 9(a) did not authorize payment of debt claims out of property seized during World War II. However, this Court quite evidently felt that a refusal of paying a debt to an American citizen which the debtor could not pay because the American Government had confiscated all his American assets, was tantamount to confiscation of the creditor's assets, and it construed Section 9 against such confiscation, holding that debt claims may be brought under that section. For many reasons, especially in order to permit equitable apportionment of debt claims in case they exceed the property against which they were filed, the Custodian drafted new legislation which was enacted by Congress in 1946, as drafted and proposed by him, and which is now Section 34. (Added August 8, 1946, c. 878, sec. 1, 60 Stat. 925.)

Distinction Between Debt Claims Under Section 34 and Actions For Return Under Section 9(a)

Prior to the drafting of the bill which later became Section 34, there had been litigation concerning the construction of Section 9(a) of the Trading with the Enemy Act in actions for the return of vested property in which the Custodian himself had asked for and had obtained decisions holding that where property had been seized as enemy property, a trustee or executor was not entitled to obtain *return* of such property if the beneficiaries who would ultimately receive it were enemy aliens. (Cf. *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F.Supp. 829.)

Notwithstanding the position taken by the Alien Property Custodian in the actions for *return* under Section 9(a), he did not suggest any qualifications which would have made the right of an executor dependent on the condition that the ultimate beneficiaries themselves qualify as claimants. On the contrary, the legislative history reveals that it was *not* the intention of the Alien Property Custodian to have such qualifications included. Rather, his intention was that debt-claims belonging to a corporation or a fund or an estate should be paid to such corporation or fund or estate in full and that the Alien Property Custodian would seize any enemy interest in such corporation or fund or estate via the vesting process.

The distinction is logical in view of the nature of the two actions: In an action for return of vested property under Section 9(a) the issue is mistaken vesting, viz. the plaintiff alleges that the property seized is in fact not enemy property and therefore should be returned. If beneficial ownership of the very same property is in enemies, evidently such property was not mistakenly vested. But an action for payment of a debt under Section 34 does not concern mistaken vesting. A plaintiff acting in a representative capacity, such as a corporation on behalf of its stockholders or a legal representative on behalf of a fund or estate merely collects a debt owing to the corporation or fund or estate. This procedure permits the executor or corporation to proceed with the administration of the estate or business undisturbed and enables the Alien Property Custodian to step into the shoes of any alien enemy and assert dominion over that alien's share in any debt-claim payable to the fund or corporation.

That this indeed was the plan of the Alien Property Custodian, appears from a discussion of the problem in the hearings on the bill.[3] John Ward Cutler, then Associate Counsel of the Office of Alien Property, was questioned as to why the bill recommended by the Alien Property Custodian would permit a U.S. corporation to claim without providing for the exclusion of possible enemy stockholders. He explained that if any American corporation is owned in part or in full by enemy persons, then, insofar as enemy interests are concerned, the control of such interests would be placed in the hands of the Custodian via the vesting process. "Therefore," said Mr. Cutler, "if you preclude them from receiving payment of debt claims, you are precluding the U.S. Government.[4]

[3] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 2d Sess., on H.R. 5089, A Bill to Amend the First War Powers Act, 1941. Serial No. 20, pp. 131-132.

[4] Hearings, supra, pp. 131-132:

Mr. Terrell: Perhaps Mr. Cutler may clear me up on one more question as to section 35(a) [now 34], which contemplates that claims may be allowed to United States corporations. I have in mind the possibility that you may have a United States corporation controlled by interests which would be precluded from bringing a suit for just compensation. I do not see that in the bill. Is that provided for?

Mr. Cutler: Yes. It is the duty of the Custodian to see that any United States corporations owned or controlled in whole or in part by enemy persons be placed in the hands of the United States Government insofar as enemy interests are concerned. Therefore, if you preclude them from receiving payment of debt claims, you are precluding the United States Government.

Mr. Terrell: In other words, the American corporation is the channel through which it gets to your controlling stockholder who may be an enemy and whose property you have received?

The fact that the Alien Property Custodian was very anxious to secure his own position as debt claimant under the statute, appears repeatedly in the legislative history and in the statute itself. In a letter dated February 1, 1946, which James E. Markham, then Alien Property Custodian, wrote to Hon. Hatton W. Summers, Chairman of the House Committee on the Judiciary, submitting an analysis of the bill, he said:

> "The debts which may be satisfied are: . . . (3) claims vested by the Custodian or otherwise acquired by him . . ."[5]

There is absolutely no doubt that it was the plan of the Alien Property Custodian that a representative of a corporation or fund or estate should not only be entitled, but under a duty to claim the entire debt due to the corporation, fund or estate, and that the Custodian would then seize any enemy interests in that debt via the vesting process.

There were practical benefits for the Custodian in such a scheme which, we may be sure, induced the

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Mr. Cutler: Yes; that has been our program.

Mr. Terrell: That may also work.

Mr. Cutler: We have eliminated the danger you mentioned by our process of vesting.

Mr. Celler: If there are such enemy nationality corporations you will seize those?

Mr. Cutler: If one should have escaped, it would undoubtedly show at the time they filed a debt claim, and we would vest at that point.

[5] p. 12 in Hearings, supra. See also Senate Report No. 1839, 79th Cong., 2d Sess., p. 5; House Report 2398, 79th Cong., 2d Sess., p. 11; U.S.C. Cong. Serv. 1946, p. 1477, and Section 34 of the Trading with the Enemy Act.

Custodian to devise it in the first place and cause the statute to be enacted in the way it now reads.[6]

Under the Statute As It Was Written and Intended, Petitioner Is Entitled to Payment.

Under the statute as it was written and as it was intended by the Alien Property Custodian, the Custodian would have vested the interests of Norman and Pia Scherf in the estate of C. Hermann Scherf, had such interests been acquired before January 1, 1947. But when Hermann wrote his will in 1949, the U.S. Government had officially announced that it would no longer vest property acquired after January 1, 1947. U.S. Treasury Department, Press Release of March 4, 1947 (App. 10a) It was now in the interest of the United States to build up trade with Germany, and vesting of newly acquired property was therefore no longer in the interest of the United States. *GMO. Nichans & Co. v. U.S.*, supra. This officially announced policy was later confirmed by Congress in Joint Resolution of October 19, 1951 (c. 519, 65 Stat. 451, 50 U.S.C. App., Note before section 1). Consequently,

[6] Suppose an estate having three equal beneficiaries, one American and two enemy aliens, held a claim worth $30,000 against property in the hands of the Custodian worth only $10,000. If the executor's right to claim depended on the eligibility of the ultimate beneficiaries, as now contended by the Government, the executor could claim one third of the debt for the American claimant that means the entire $10,000. To forestall this, the Custodian sought enactment of Section 34 which intended to force the executor to collect the $10,000 as an asset of the estate, enabling the Custodian to vest two third of that amount as interests of the enemy aliens. In effect, the Custodian is applying one rule where the beneficial interests in the estate are subject to vesting and a different rule where they are not subject to vesting.

when C. Hermann Scherf died, there was no longer any authority on the part of the Alien Property to seize any interests in Hermann's estate.[7]

Under the statute as it was written and intended, the Executor had the right and the duty to collect the entire debt owing to the estate. The Custodian can no longer vest the interests of Norman and Pia, but he refuses to pay the debt solely because of the interests which Norman and Pia have in the estate. Thereby the Custodian, in actual effect, has confiscated their interests without any statutory authority.

Debt-Claimant

All through the administrative proceedings, Hermann, the original creditor, was treated by the Government as the "debt-claimant" and petitioner as his "legal representative" under the terms of the Statute. This was so much the more logical, as Hermann himself had negotiated with the Office of Alien Property for a license to permit a change of beneficiary of the policy which would have secured Hermann's claim

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[7] On July 9, 1951, the President of the United States addressed a letter to the Vice President, 97 Cong. Rec., part 6, pp. 7762-7764, requesting the Vice President to lay before the Congress, for its consideration, an attached draft of a proposed Joint Resolution to terminate the state of war between the United States and Germany. In that letter, when speaking about the program of vesting German property in this country on or before December 31, 1946, the President said expressly:

> 'The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. It is limited to German property and rights located here before or during the period of hostilities.'

against Alexander. Hermann himself had thus appeared as "debt-claimant" during his life time.

Not until action was brought in the District Court, did the Government argue that to be a debt-claimant, one must be the owner of the debt at the time of vesting; and consequently Hermann could not be a debt-claimant because Alexander's property was not vested until after his death. The Court of Appeals adopted that theory.

The statute contains no definition of "debt-claim" or "debt-claimant." The only limitations or qualifications of debt-claims allowable under the statute are (1) that they be due and owing at the time of vesting (i.e. existed prior to vesting) and (2) that the owners be citizens or residents since beginning of the war. The only place the word "debt-claimant" appears in Section 34(a) is in the last sentence making personal representatives of debt-claimants eligible to the same extent their principals would have been. The word "debt-claimant" does not mean one who has filed a claim because the language in sub-paragraph (f) "any interested debt claimant who has filed a claim * * *" shows there may be debt claimants who have not filed claims. It follows that in the statute "debt claimant" means the owner of a debt, and in order for the debt to be allowed, the debt must have been in existence at the time of vesting, that means it must have existed before that time.

It is clear that by "debt claim" the statute means a claim which a creditor had against a person whose property was later vested. If the Government's theory were correct that Hermann could not be a "debt claim-

ant," then there would be no need for him to meet the qualifications of the statute. But if this were a case where the executor and all the beneficiaries under the will would individually qualify as debt claimants and Hermann would not, then the Alien Property Custodian would be the first to point out the absurdity of a construction which disregards the qualifications of the very person in whose interest the statute was created, namely, the primary creditor. For it was the declared purpose of Section 34 to assure payment of debts out of vested property where American creditors had extended credit to the owners of such property in reliance upon their American assets.[8]

The argument over who is the debt claimant, Hermann or his executor, is, however, of no practical consequence. For even if Alexander's property had been vested while Hermann was still alive and Hermann himself had filed the claim and then had died, the issue would be exactly the same; the Alien Property Custodian would refuse to pay the debt owing to Hermann's estate for exactly the same reason, namely that he is no longer able to confiscate the interests of Norman and Pia in the estate.

Consequently, whatever the theory under which the executor claims, he does so on behalf of the estate and not on behalf of any individual beneficiary. The ultimate beneficiaries cannot be determined at this time. It is under any theory a situation in which the statute as planned and written contemplated vesting of "enemy" interests in the estate by the Custodian. Since such vesting powers no longer exist, the Custo-

[8] Senate Report, supra, pp. 4, 5; House Report, supra, pp. 9, 10, U.S.C. Cong. Serv. 1946, pp. 1476, 1477.

dian has attempted to achieve the same result by statutory construction. He could do so only by writing into the statute words which had been deliberately left out. The Hearing Examiner of the Office of Alien Property quite openly admitted this in his decision (J.A. 21), where he said that:

> "this Office in effect added the following sentence to the foregoing excerpt of Section 34(a):
>
> *Debt claims of claimants holding only legal title to the debt shall be allowed only to the extent that the owners of the beneficial interests would not themselves be disqualified hereunder from allowance of a debt claim.*

The District Court construed the statute in the way it had been planned and enacted and held in effect that the Alien Property Custodian cannot change an Act of Congress by administratively adding a sentence which is not in the statute and which was left out deliberately when the statute was drafted and enacted by Congress.

The Court of Appeals overruled the District Court, evidently in the belief it was filling a "gap" in the statute by judicial construction.

We are, however, not confronted with a "gap" in the statute, but are dealing with a war statute which had become partially inoperative. What the Court of Appeals in effect did, was to restore the inoperative part by judicial construction although no statutory authority therefor exists.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,109

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, APPELLANT

v.

PHILIP J. MARON, Executor of the Estate of C. HERMANN SCHERF, DECEASED, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided May 22, 1958

Mr. Irwin A. Seibel, Attorney, Department of Justice, with whom *Mr. George B. Searls*, Attorney, Department of Justice, was on the brief, for appellant.

Miss Hermine Herta Meyer, with whom *Messrs. Harry W. Blair* and *Newell Blair* were on the brief, for appellee.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case raises questions relative to "debt claims" by American citizens against alien property seized by the Government. The governing statute is Section 34(a) of the Trading With the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C.App. § 34(a)(1952), which provides in pertinent part:

> "No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting . . . . Debt claims allowable hereunder shall include

only those of citizens of the United States . . . [and certain others not here involved]. Legal representatives . . . or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been."

The facts are briefly these:

From January 13, 1939, until his death in New York State on December 5, 1950, Hermann Scherf (an American) paid his German brother Alexander's premiums on a life insurance policy issued to Alexander by an American insurance company. Hermann's last payment was made on January 16, 1950. The next, and final, payment was made on January 15, 1951, by Hermann's executor, the appellee Maron (an American). Eleven days later the Government vested Alexander's insurance policy, Vesting Order No. 17,256, 16 FED.REG. 1492 (1951), and converted it into cash. In August of 1951 Maron filed a claim against the fund, asserting that the cash value of Alexander's policy was available to pay the claim of Hermann's estate against Alexander for premiums paid by Hermann since 1939. Alexander died in 1954, still a German citizen.

Administrative proceedings were held, and Maron's claim (so far as here relevant) was denied. The Government's ground for denial was that Norman and Pia Scherf, two of Hermann's heirs,[1] are the only persons who would gain from allowing Maron's claim. Being German citizens, they are ineligible under the statutory provisions to take in their own right as claimants against the fund. Interposition of the executor Maron, who merely holds legal title for the benefit of Norman and Pia, does not—

[1] The third heir, Edward Gerhardy, is an American, and the Government concedes he is not barred. His interests are not involved here.

so the Government held—give them greater rights than they would have on their own.

Maron sought review in the District Court under Section 34(e) of the Act. On cross motions for summary judgment, the District Court found that Maron was not the debt claimant, but that he was the "legal representative" of the debt claimant, the deceased Hermann. And since Maron was a "legal representative" who was not individually ineligible, the District Court held the claim improperly disallowed. This appeal followed.

The Government argues here that the only person who can be a "debt claimant" within the meaning of the statute is the executor Maron. Status under Section 34 is determined, says the Government, by the situation on January 26, 1951, when the policy was vested. Therefore Maron—not Hermann, who died prior to vesting—is the debt claimant. Hermann was not during his lifetime a "debt claimant," since the policy had not been vested; he was, at best, only a creditor of Alexander.

We think that the Government's construction of "debt claimant"—the person owning the debt at the time of vesting—is correct. It is not only rational and clearly within the statutory terms, but provides for reasonable certainty in administration.[2] Maron virtually concedes as much in his brief, when he states: "If we wish to be technical, then we must admit that a debt claimant under Section 34 is a person who is claiming payment of a debt out of vested property." It is conceded by the Government that Maron is individually an eligible debt claimant within the meaning of the statute.

Under the applicable local law of New York—the place of death, probate and administration—an executor is a

[2] Problems may arise involving post vesting transfers of claims, but they need not be treated here.

mere conduit of the property to the heirs.[3] Maron can stand in no better position than Norman and Pia, who are barred from taking. The policy of Section 9(a) of the Act governing *returns* of vested property is applicable as well to Section 34: the extent of the fiduciary's recovery should be measured in terms of those who will ultimately benefit.[4] But, quite apart from Section 9(a), it would be unsound to hold that the eligibility of the naked titleholder is determinative. It cannot be imagined that Congress intended that, had Pia and Norman been war criminals, Maron could nonetheless have recovered for their benefit in our courts because he was technically an eligible debt claimant.

Reversed and remanded with directions to enter judgment for appellant.

DANAHER, *Circuit Judge*, (concurring), with whom, BURGER, *Circuit Judge*, joins: I concur in Judge Washington's opinion only because it seems to be compelled. The law reads just as he says, but I deem the result grossly and inherently unfair. Alexander Scherf in 1927 was issued a policy of life insurance in the amount of $30,000 on which he paid the premiums until 1938 when the foreign exchange laws of Germany precluded his further remittances to the Mutual Life Insurance Company offices in New York. His American brother Hermann, commencing in 1938 paid all premiums until, after his

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[3] Blood v. Kane, 130 N.Y. 514, 29 N.E. 994 (1892).

[4] See Cordero v. United States, 111 F.Supp. 556, 558 (S.D. N.Y. 1953), *aff'd sub nom.* Cordero v. Brownell, 211 F.2d 90 (2d Cir. 1954); Public Administrator of New York County v. McGrath, 104 F. Supp. 834, 836 (S.D. N.Y. 1952); Central Hanover Bank & Trust Co. v. Markham, 68 F. Supp. 829, 831 (S.D. N.Y. 1946). See also Farmers' Loan & Trust Co. v. Hicks, 9 F.2d 848, 853 (2d Cir.), *cert. denied*, 269 U.S. 583 (1925); Kamano Fujino v. Clark, 172 F.2d 384 (9th Cir.), *cert. denied*, 337 U.S. 937 (1949); Miller v. Schutte, 52 App.D.C. 359, 287 Fed. 604, *appeal dismissed*, 263 U.S. 730 (1923).

death, the final 1951 premium was paid by the appellee Maron, as executor of Hermann's will. These payments aggregated $11,426.20 and, with interest of $4,371.13 made up the total of the "debt claim" urged by the executor. Long after the war, on July 29, 1949, this American citizen executed his will in the light of the Custodian's policy, previously announced. The Hearing Examiner's decision points out, relying upon the annual report of the Office of Alien Property for the fiscal year ending June 1947, that "during the fiscal year of the United States Government beginning July 1, 1946 and ending June 30, 1947, it was decided, by agreement between the Department of Justice and the State and Treasury Departments *to refrain from vesting property acquired in the United States* by nationals of Germany or Japan *subsequent to December 31, 1946.*" (Emphasis added.)

The following year, 1947, Hermann Scherf's nephew, Norman, and Hermann's niece, Pia, came to the United States, and ever since have resided either here or in Canada. By his 1949 will, Hermann made provision that his niece Pia "so long as she may be a resident of Canada or the United States" should receive $50 per month during the life of a trust. Other income was to be expended by the trustees "for the support, education and maintenance of my nephew, Norman Scherf, while attending college," and thereafter for a period of five years, Norman was to receive certain income of the trust. I omit other details. Of course, Norman and Pia acquired no interest until Hermann's death on December 5, 1950. The Attorney General's vesting order No. 17256 was executed on January 26, 1951, effective February 12, 1951.

While the executor, a New York attorney and an American by birth, would be an eligible debt claimant in his individual capacity, under New York law as an executor he holds legal title to the debt, but the beneficial interests are owned by those to whom the executor would even-

tually distribute the proceeds. That there was a debt accruing because of Hermann's payments between 1938 and 1951 seems clear on the record before us. But the statute provides that "debt claims" allowable shall include only those of citizens of the United States (or certain longtime residents of the United States). Thus, since Norman and Pia are not citizens of the United States and were not here resident between 1941 and 1946, they as beneficiaries are ineligible claimants.

This seems to be so notwithstanding the announcement in 1947 by our Government of the policy to refrain from vesting property acquired in the United States by nationals of Germany subsequent to December 31, 1946. Norman and Pia acquired their interest in *Hermann's* estate at his death on December 5, 1950.

Obviously, it was then too late for Hermann to have made other disposition of his creditor claim as between him and his brother arising because of the payments he had made on his brother's life insurance policy. Had Hermann known that despite the announced policy of the Custodian, his claim would later be vested, he readily, by will, or otherwise could have made valid arrangements as to his own property, even to the point of carrying out his plans for these very beneficiaries. The Custodian acted two months after Hermann died. It is recited in the vesting order that "The national interest of the United States" required the step. Since Hermann's misplaced reliance upon an officially announced Government position resulted in making beneficiaries of Norman and Pia who are ineligible "debt claimants," Hermann's interest or that of his estate becomes forfeited, notwithstanding his loans of thousands of dollars to keep the life insurance policy in force.

That seems to be the law but it does not seem right.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be; and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment for the defendant.

Dated: May 22, 1958.

Per Circuit Judge Washington

Separate concurring opinion by Circuit Judge Danaher, with whom Circuit Judge Burger joins.

Constitutional Provision

AMENDMENT V

"* * * nor shall any person * * *; * * * be deprived of life, liberty, or property without due process of law; * * *

Statutes Involved

The relevant portions of the Trading with the Enemy Act (60 Stat. 925, 50 U.S.C. App.) are:

> Sec. 9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from any enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath . . . if the

claimant shall have filed the notice as above required . . ., said claimant may institute a suit in equity . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled . . .

Sec. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U.S.C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include

only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U.S.C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

* * * *

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any

findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

Sec. 34(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted or further maintained except in conformity with this section . . .

TREASURY DEPARTMENT
WASHINGTON

PRESS RELEASE March 4, 1947

The Secretaries of the Treasury, State and War and the Attorney General today announced that hereafter a license under the Trading with the Enemy Act will not be necessary to enter into current business transactions, and to communicate with persons in Germany and Japan. This action was taken after consultation with the United States Military Authorities in Germany and Japan, and was effected by including those countries in Treasury General License No. 94, and by amending Public Circular No. 25. General Ruling No. 11A and General License No. 95 were also amended to implement this decision. The amendments do not, however, include relaxation of controls on transactions which involve the use of German and Japanese property blocked on December 31, 1946, and income subsequently accruing thereon, which still remains subject to vesting by the Department of Justice.

* * * * *

A further step in today's action was the amendment of General Ruling No. 11A. This amendment removes from blocking regulations property in which a German or Japanese interest has been acquired after December 31, 1946.

In this connection, the Attorney General also announced that henceforth, in general, the Office of Alien Property, Department of Justice, will not vest German or Japanese interests acquired after December 31, 1946. Accordingly, persons acting under judicial supervision need no longer report German or Japanese interests acquired after December 31, 1946, and, so far as Office of Alien Property regulations are concerned, may transfer such property. Likewise, no report on Form APC 56 need be filed with respect to German or Japanese interests acquired after December 31, 1946. These changes were accomplished by amendments to § 503.20-1 and § 503.7-1, and by adding a new Regulation (no. 2) to § 503.40 of the rules of the office of alien property.

Joint Resolution of Congress of October 19, 1951 (c. 519. 65 Stat. 451)

* * * "That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which *prior to January 1, 1947 was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under the Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. * * *" (Emphasis supplied)